CASE NO. 83-1478



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

JERSEY CENTRAL POWER & LIGHT COMPANY,

*Appellant,*

*v.*

BOARD OF PUBLIC UTILITIES OF THE STATE OF NEW JERSEY,

*Appellee.*

**On Appeal from the Supreme Court of New Jersey**

# MOTION OF APPELLEE, DEPARTMENT OF THE PUBLIC ADVOCATE DIVISION OF RATE COUNSEL TO DISMISS APPEAL, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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## Counter-Statement of Facts

The Board's decision should be affirmed particularly in recognition of the many positive steps taken by the Board to protect the investor interests in the face of the many problems which confronted Jersey Central Power & Light Company (hereinafter "JCP&L" or "Jersey Central"). The Appellate Division noted that "Because of the accident, JCP&L has been before the New Jersey Board of Public Utilities on an almost daily basis seeking various forms of relief" (JCA-6).* The rates of JCP&L have increased substantially since the accident and at a much higher rate than would have been the case but for the accident. The Board has given ample consideration to JCP&L's investors' interests in its ratemaking determinations in the wake of the accident which occurred on March 28, 1979 at the Three Mile Island nuclear plant, Unit 2 (TMI-2). The damaged TMI-2 unit has remained inoperable since the accident and still must be decontaminated. The TMI-1 unit was shut down for refueling at the time of the accident and has remained shut down by order of the Nuclear Regulatory Commission (NRC).

Apart from the immediate potential health hazards associated with the TMI accident, the most pressing problem for the Board with regard to JCP&L was the economic one of providing the utility with the financial ability to operate its utility plant and to purchase replacement power to serve its customers.

In May of 1979 JCP&L filed with the Board in Docket No. 795-427 for a pass through of its replacement power costs to its ratepayers through its Levelized Energy

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* "JCA" refers to JCP&L's Appendix; "JC" refers to JCP&L's Jurisdictional Statement. "A" refers to this Appellee's Appendix.

Adjustment Clause (LEAC*). On June 18, 1979 the Board in that docket allowed JCP&L to pass through its replacement power costs resulting from the TMI accident (A-17). JCP&L was allowed a LEAC rate increase of $74.5 million.

In that order the Board determined that because of the severe damage to the TMI-2 unit it was no longer used and useful in serving its ratepayers and that ratepayers should not have to pay a return on the utility's investment on that inoperable unit. Accordingly, the Board reduced JCP&L's base rates by $29 million to reflect the exclusion of TMI-2 from rate base simultaneously with its allowing JCP&L a $74.5 million LEAC increase to pay for replacement power. The Board thus balanced the interests of the shareholders with those of the ratepayers. JCP&L did not appeal to any court from the Board's order removing its investment in the TMI-2 unit from its rate base.

On April 1, 1980 in Docket No. 795-427 (A-1) the Board, because of the increasing uncertainty associated with the return to service of TMI-1, removed that unit from the utility's rate base so that ratepayers would no longer pay a return on the company's investment in that idle unit through base rates. However, the Board simultaneously accelerated the timing of the collection from ratepayers of the utility's unrecovered deferred energy balance** in

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* LEAC is a tariff which allows the utility to pass through increases in its fuel costs to ratepayers. Fuel costs are estimated for the next annual period and the LEAC rate is fixed to recoup those costs. There is a review after six months, and there is a reconciliation of overrecoveries or underrecoveries at the end of the LEAC period.

** "Deferred energy balance" refers to those unrecovered energy costs due to shortfalls in collections from prior fuel clause adjustments. Prior to the acceleration provided for in the April 1, 1980 Order, the Board had ruled that JCP&L's collection of this balance from ratepayers would be allowed only over a 22 year period.

an amount sufficient to offset the revenue impact of excluding TMI-1 from rate base. The result of the Board's action was that there was no reduction in rates. Again the Board had acted to preserve JCP&L's cash flow position to pay for its current operating expenses, including replacement power. The Board also provided for an expedited procedure for returning the TMI-1 unit to rate base if it were restarted.

JCP&L appealed the removal of the TMI-1 unit from its rate base as an unconstitutional taking of its property. On April 8, 1981 the Supreme Court of New Jersey rejected the utility's appeal and affirmed the Board's order approving the balancing of the shareholders' interest with those of the ratepayers which had been accomplished by the Board. *In re Jersey Central Power & Light Co. Petition,* 85 N.J. 520, 428 A.2d 498 (1981). JCP&L did not appeal that decision to this Court.

On April 29, 1980 in Docket No. 804-285, JCP&L filed for an additional $173.5 million in base rate revenues. In less than a month, on May 13, 1980, the Board granted JCP&L an emergency interim increase of $60 million. On July 31, 1981 the Board granted JCP&L an additional $110.7 million including the $60 million of interim relief. The Board again reiterated the availability of an expedited procedure for including JCP&L's investment in TMI-1 in its rate base in the event that such unit were to be restarted.

In its 1981 rate order, the Board enumerated some of the positive steps which it had taken to improve the financial position of this utility as follows:

(1) Approved the Revolving Credit Agreement under which the utility obtained short term financing;

(2) Provided for the accelerated pass through of the utility's deferred energy costs to the ratepayers;

(3) Intervened in federal adminstrative proceedings involving the pricing of energy sold to the utility;

(4) Supported the early NRC approval of a TMI-1 restart; and

(5) Endorsed the concept of a federal contribution toward the TMI-2 clean-up costs (JCA-12 to 13).

In that order of July 31, 1981 the Board allowed the company a return on equity of 16% with an overall rate of return of 10.68%. The Board believed that that rate, "the highest ever granted a New Jersey utility," adequately reflected the risks facing the company.

In its order dated July 31, 1981, the Board also found that JCP&L had abandoned its Forked River nuclear generating project on April 4, 1979. The Appellate Division's decision recognized that "the ratepayers had already paid over $53 million in constructing the project in the form of construction work in progress included in rate base, from which ratepayers will never draw any benefit." (JCA-40) JCP&L had made an investment of over $400 million in that abandoned project. Consistent with its normal practice the Board recognized the investors' interests by allowing the utility to recover its net abandonment loss from the Forked River plant*—$225 million—from the ratepayers over a 15 year period at a cost of approximately $31.6 million per year to the ratepayers.

On August 11, 1981 JCP&L filed for a $238.5 million increase in revenues which it later reduced to $215 million. On July 22, 1982 the Board granted the company an $82 million increase which permitted JCP&L to pass through to ratepayers $13.8 million annually for 5 years for the decontamination of the TMI-2 unit. That order also allowed JCP&L a 17% return on equity.

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* The investment made by JCP&L was reduced for certain adjustments and then reduced to reflect the income tax savings for the abandonment.

On September 2, 1982 the Board permitted another increase in JCP&L's Levelized Energy Adjustment Cause rate to pass through additional replacement power costs to ratepayers.

Through the Board's additional actions approving a subsequent Revolving Credit Agreement and two dividend payments to its parent, GPU, to service and fund debt which had been invested in JCP&L, JCP&L has continued to raise short term financing and has continued to pay for replacement energy to serve its customers while it remains in business after "the worst accident in the history of commercial nuclear power generation" in the United States. (Report of the President's Commission on the Accident at Three Mile Island, October 1979)

Thus, the Board in its various regulatory determinations for JCP&L in the wake of the TMI accident has given ample consideration to JCP&L's investors' interests. In the words of the Appellate Division:

> It appears to us that JCP&L is seeking to ignore the difficult task which the Board has taken on in an attempt to keep that organization vital and still servicing the ratepayers. We believe that if it were not for the activities of this Board, JCP&L and its investors might well be nothing more than history. It does not serve the public well for the utility to take the attitude that it is entitled to everything when it fact it has gotten itself into a position where it must rely on the public to save it (JCA-35).

## Motion to Dismiss or in the Alternative Motion to Affirm

Pursuant to Supreme Court Rule 16.1(b) and (d), Appellee, the Department of the Public Advocate, Division of Rate Counsel ("Public Advocate")* hereby moves that

* The Department of the Public Advocate, Division of Rate Counsel, is a state agency which pursuant to N.J.S.A. 52:27E-1 *et seq.* represents the public interest in rate proceedings and appeals therefrom.

this Court dismiss this appeal of Jersey Central Power & Light Company because of an absence of a substantial federal question. In the alternative, the Public Advocate moves that this Court affirm the decision of the Supreme Court of New Jersey rendered below.

## Introduction

### 1. Overview.

Jersey Central Power & Light Company purportedly is appealing from the judgment of the New Jersey Supreme Court denying certification and dismissing JCP&L's appeal regarding two decisions of the New Jersey Board of Public Utilities ("Board") which fixed rates for JCP&L. We propose to demonstrate in the course of this motion that (a) no substantial federal question is presented and (b) the Board's decisions were abundantly supported by generally accepted principles of public utility regulation and that ample consideration was afforded to utility investors' interests as is evidenced by the specifics of the Board's ratemaking determinations for JCP&L described in detail herein in the Counter-Statement of Facts and in Appellee's Argument in Support of its Motion to Affirm.

It will be demonstrated herein that there is an absence of a substantial federal question in that the assertion by appellant that the decision of the Board, affirmed by the New Jersey Superior Court, Appellate Division, and denied review by the New Jersey Supreme Court, patently involves no violation of the Fifth or Fourteenth Amendment of the United States Constitution—the federal constitutional grounds relied upon by JCP&L.

### 2. Jersey Central's "Questions Presented".

Appellant JCP&L's Jurisdictional Statement states two "Questions Presented" which should be rejected as inac-

curate because of assumptions implicit in the questions which are not borne out by either the law or the facts. For example, we dispute the included assertion in Question 1 that the three investor-interest components discussed in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 603 (1944) (*Hope*) were intended by the opinion in that case to constitute inviolate criteria as to whether electric utility rates are "just and reasonable" and that they were held therein to be of constitutional dimension.

Similarly, as to Appellant's Question 2, we dispute the assumption therein that the Board failed to assess the consequences of its rate determinations to customers and to investors.

Upon a reading of the Jurisdictional Statement as a whole, we conceive the issues of federal constitutional law actually here raised by Jersey Central to be as follows:

1. Whether *Hope* holds that a public utility's Fifth and/or Fourteenth Amendment due process property rights are necessarily denied by a decision of a state rate regulator which fails explicitly to address whether and fails to conclude that the rates determined will be sufficient not only "to recover operating expense and capital costs" but also "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital" ("investor-interest factors").

2. Whether there is a violation of the Fifth and Fourteenth Amendment due process property rights of a public utility whose rates are determined by a state regulator if the regulator fails to make specific findings of fact as to whether the rates allowed will be sufficient to satisfy the "investor-interest" factors mentioned in Question 1 hereinabove.

This motion to dismiss the appeal is premised primarily on the view that the Jurisdictional Statement of JCP&L

fails to state a substantial federal question. The questions purported to be raised are (1) that the order of a state regulator, to meet substantive due process standards, must necessarily address each of the so-called investor-interest factors mentioned in the *Hope* opinion (320 U.S. at p. 603) and demonstrate the sufficiency of the rates allowed to satisfy each of those criteria, regardless of the contents of the rate decision in any other respect; and (2) that due process also requires that the findings of fact by the state regulator as to each of the determinations just stated be specific enough to enable a reviewing court to determine whether or not the three investor-interest criteria have been found satisfied by the rate decision.*

We propose to demonstrate the patent absence of any federal constitutional support for either of the propositions thus asserted.

## ARGUMENT IN SUPPORT OF MOTION TO DISMISS UNDER RULE 16.1(b) BECAUSE OF AN ABSENCE OF A SUBSTANTIAL FEDERAL QUESTION

**I. *Hope* dealt with the requirements of the Natural Gas Act.**

The *Hope* opinion, and particularly page 603 thereof, relied upon by appellant, may be searched in vain for any allusion to the existence of a federal constitutional requirement with respect to the three investor interest criteria as controling the rate making powers and duties of the Federal Power Commission acting under the then provisions of the Natural Gas Act (15 U.S.C. §717). On the other hand, the opinion is replete with allusions to the

* This is precisely what the Appellate Division characterized as the "utility's only constitutional argument . . ." (JCA-35).

statute under which the Federal Power Commission was exercising its rate-making powers in that case. 320 U.S. at 593, 600, 602, 603, 605, 607, 609, 611, etc. Indeed, the Court stated in *Hope*:

> "Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former." *Id.* at 607.

In other words, conformance with the statute automatically guarantees constitutionality. In any event, any doubt as to whether *Hope* dealt only with the construction of the Natural Gas Act and not of the Constitution was laid to rest in an unanimous opinion of the Supreme Court the following year in *Market Street. R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548 (1945). In that case, the utility, in challenging a state regulatory commission's reduction of its charges on a constitutional basis, cited the identical investor-interest criteria of *Hope* relied upon by JCP&L. In rejecting the argument of the utility, the Court stated that the *Hope* case "was reviewed pursuant to statute rather than under the Fourteenth Amendment". *Id.* at 566.

It is thus clear that, apart from any other considerations, whatever was said in *Hope* concerning investor-interest criteria for rate fixing purposes did not involve a constitutional appraisal but merely an interpretation of the Natural Gas Act. It follows that JCP&L's thesis of a constitutional underpinning for the investor-interest factors is specious.

**II. The *Hope* opinion, read as a whole, does not support the thesis that the investor-interest criteria mentioned therein are of constitutional dimension or that they require express articulation in a State rate case decision in order for it to survive constitutional scrutiny.**

The *Hope* litigation essentially involved a dispute over the rate base used by the Federal Power Commission to determine "just and reasonable" rates or charges. The Court held that no precise formula for making that determination was imposed by Congress. As the Court said:

> "And Congress has provided in §19(b) that on review of these rate orders in the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive'. Congress, however, has provided no formula by which the 'just and reasonable' rate is to be determined. It has not filled in the details of the general prescription of §4(a) and §5(a). It has not expressed in a specific rule the fixed principle of 'just and reasonable'". 320 U.S. at 600-601.

The Court went on to indicate that no judicial principle bound the Commission to the use of any particular formula. It said:

> "We held in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, *supra*, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its ratemaking function, moreover, involves the making of 'pragmatic adjustments' * * * Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. [citations omitted]. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable judicial inquiry under the Act is at an end". 320 U.S. at 602.

In the light of the unequivocal abnegation by the Court in *Hope* of the imposition of any specific formula by which

the ratemaking body is required to articulate its determination of just and reasonable rates, JCP&L's effort to read into the *Hope* opinion a holding that the investor-interest factors discussed at page 603 of the opinion mandatorily require specific articulation in determination of gas rates under the Natural Gas Act—let alone constitute constitutional decisional prerequisites in a state electric utility case —is doomed to failure.

The inquiry then naturally arises, however, as to the significance of the discussion in the *Hope* opinion of the investor-interest factors if the Court did not intend their mandatory use for either gas rate determinations under the Natural Gas Act or as constitutional prerequisites in any rate case, state or federal. We suggest that the Court's purpose was to lay a basis for its demonstration that the Commission had, in fact, in the case under review, paid attention to the investor-interest factors under discussion. To the extent that the investor interest criteria were pertinent, the Federal Power Commission ("F.P.C.") refuted the company's position as to the insufficiency of the determination of rate base.

Close attention to the language of the Court in formulating the investor-interest factors, and to the discussion which follows in the opinion, supports our position. The Court states:

> "But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. *From the investor or company point of view* it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. [citations omitted]. *By that standard* the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." (Emphasis added). *Ibid.*

It should be carefully noted that the Court is not purporting to state the constitutional requirements of a rate base but merely what is important "from the investor or company point of view". *Ibid.* Immediately following the above quotation the Court clearly implies that "more or less" than the quoted objectives "might be allowed". *Ibid.* Even more directly, the Court indicates that it is not important to the case before it "to determine the various permissible ways in which any rate base on which the return is computed might be arrived at" *Ibid.* because the "*end result*" in the case could not "be condemned under the Act as unjust and unreasonable from the investor or company viewpoint". *Ibid.*

Thus, the Court's intent to state the investor-interest factors merely as a preface to a demonstration that those factors, whatever their significance, were satisfied in the case before it, is made clearly apparent. The recital of those factors has no other pertinence—and certainly no constitutional significance. Our reading of the allusions to the investor-interest criteria in the *Hope* case was precisely that of the Court itself the following year in *Market Street R. Co.* v. *Railroad Com. of Cal., supra,* 324 U.S. at 566-567.

It follows *a fortiori* that the stated investor interest criteria need neither express articulation nor any incorporation in express findings of fact to enable a rate decision to pass constitutional scrutiny.

**III. No other decision by the Supreme Court interprets *Hope* as requiring express consideration of the investor-interest criteria in a State rate determination as a Fourteenth Amendment due process prerequisite.**

Appellant cites two subsequent decisions of this Court as purportedly confirming its interpretation of *Hope* to the effect indicated in its Jurisdictional Statement. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968); *Federal Power Commission* v. *Memphis Light, Gas and Water*

*Division*, 411 U.S. 458 (1973). We submit that close examination of those decisions discloses no support for appellant's thesis. Neither case elevates the investor-interest criteria mentioned in *Hope* to constitutionally mandatory constituents of a formula universally applicable in utility rate decisions.

We have examined every Supreme Court opinion citing *Hope* and find none setting aside a rate order for failure of the rate-making body to justify its decision by reference to the investor-interest factors mentioned in *Hope*.

**IV. Investor-interest factors may be downgraded in rate-making if the enterprise has suffered a loss in value or earning power from extrinsic circumstances.**

The extent to which a rate-making body can properly require ratepayers to support the capital needs of a utility necessarily depends on the economic health of the enterprise. Where a utility falls into financial distress, not because of insufficiency of revenues *per se*, but because of unforeseen economic or other disastrous conditions, it cannot expect to be rescued by the imposition of artificial and inflated burdens upon its ratepayers. JCP&L suffered such abnormal economic vicissitudes in the breakdown of its TMI-2 nuclear facility in Pennsylvania, the accompanying denial of a certificate to operate the companion TMI-1 facility and in the abandonment of the uncompleted Forked River nuclear plant in New Jersey.

That *Hope* does not stand for Jersey Central's so-called "Hope Standards" can be seen by reading the entire paragraph in Hope from which they are culled:

> The rate-making process under the act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus, we have stated in the Natural Gas Pipeline Company case that "regulation does not insure that the business shall produce net revenues." 315 U.S.

at 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. *From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.* These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. *The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at.* For we are of the view that the end result in this case cannot be condemned under the act as unjust and unreasonable from the investor or company viewpoint. (Some citations omitted). 320 U.S. at 603 (emphasis added)

Thus, *Hope* explicitly recognized that there may be conditions when "less might be allowed." Justice Douglas's language in *Hope* is strikingly similar to a passage from the concurring opinion of Justices Black, Douglas and Murphy in the earlier *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 606-8 (1942):

In view of [the] provisions [of the Natural Gas Act] we do not think it is permissible for the courts to concern themselves with any issues as to the economic merits of a rate base. The Commission has a broad area of discretion for selection of an appropriate rate base. The requirements of "just and reasonable" embrace among other factors two phases of the public interest: (1) the investor interest; (2) the consumer interest. The investor interest is adequately served if the utility is allowed the opportunity to earn the cost of the service. That cost has been defined by Mr. Justice

> Brandeis as follows: "Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issued therefor, the allowance for risk incurred; and enough more to attract capital." (citation omitted) . . .
>
> One caveat however should be entered. *The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably a return to the company of the cost of the service might not be "just and reasonable" to the public* . . .
>
> *This problem carries into a field not necessary to develop here.* It re-emphasizes however that the investor interest is not the sole interest for protection. *The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment though fair to investors would be grossly unfair to consumers* . . . (emphasis added).

Neither *Hope* nor *Natural Gas* involved a factual situation where a return to the company of the cost of service (including capital costs) would not be "just and reasonable" to the public; the investor and consumer interest did not collide. The collision speculated upon *did* occur and confront this Court one year after *Hope* in *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548 (1945).

*Market Street* was an appeal of an order reducing fares from seven to six cents. *Re Market Street R. Co.*, 54 P.U.R. (N.S.) 214 (1944). The Commission estimated that a six-cent fare would produce a reasonable return of approximately 6% on a rate base of $7,950,000, whereas the existing seven-cent fare would yield an excessive 9.6% return on the same rate base. The rate base chosen represented the price at which the company had offered to sell its operations to the city, whereas the book value of the company's property was approximately $38,000,000. The constitutional issue was clearly presented—the fare

reduction was calculated to decrease net income over that which would have been realized by maintaining the higher fare and thereby caused the return on book value to deteriorate even further. *Id.* The company appealed, making essentially the same allegations about the constitutional requirements imposed by *Hope* that Jersey Central made. In rejecting these contentions, the Court held that:

> Without analyzing rate cases in detail, it may safely be generalized that the due process clause never has been held by this Court to require a commission to fix rates on . . . the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent government destruction of existing economic values. It has not and cannot be used to insure values or to restore values that have been lost by the operation of economic forces. 324 U.S. at 567.

Thus, to the extent that the capital needs of a utility are ordinarily appropriate for consideration in determining the sufficiency of the revenues allowed it in a rate proceeding, this case falls into the category with those cases "when less might be allowed." *Hope, supra,* 320 U.S. at 603.

**V. The Board gave due consideration to investor interests.**

Although we have demonstrated that articulation in express terms of investor-interest criteria in a rate determination is not constitutionally indispensible, we nevertheless point out that the Board was acutely conscious of JCP&L's potential financial problems and was influenced by them in the extent of the affirmative relief granted and in the denial of the Public Advocate's attempt to diminish relief on a basis of "fault" of the utility in relation

to the TMI accident. The details of affirmative relief are recounted in the Appellate Division opinion (JCA-12 to 13).

In rejecting an inquiry into fault prior to granting any rate relief the Board, to quote the Appellate Division,

> "[a]lso expressed its concern for the impact the initiation of a fault inquiry might have upon an already wary banking community upon which JCP&L was exclusively dependent for credit, and also upon possible recovery by ratepayers in related civil litigation involving alleged negligence by Babcock and Wilcox, manufacturers of the TMI reactor." (JCA-18).

In fixing a rate of return on equity of 17% as against the Public Advocate's espousal of a rate of from 14.84 to 15.69%, the Board noted the yields of long term bonds; the fact that JCP&L had limited access to traditional money and capital markets (JCA-21); and also, that the 17% being allowed JCP&L on equity compared favorably with the recently allowed 16% for Public Service Electric and Gas Company which presented a lesser risk. *Ibid.*

The Board further adverted to JCP&L's financial problems when, in rejecting the fault issue raised by the Public Advocate, it held that the company must be financially able to continue providing service (JCA-25). The Board manifested its concern over the fact that the company had not paid a dividend in two years; that it had no access to capital markets to cover capital costs; and that it was paying expenses out of a short-term bank credit. (JCA-25 26). The Board stated that it would not do anything which "would go to the very heart of the financial viability of this utility and its ability to serve its customers". (JCA-26). The Board clearly provided adequate funds for the company to pay for all of its necessary operating and maintenance expenses including replacement power, its interest payments and dividends on preferred stock. Therefore, even though this company possessed a substantial

amount of useless assets, rates were substantially increased and funds were provided to permit the company to remain in business.

In dealing with the appropriate rate of return, the Board recognized that "[c]apital and credit markets reflect the consensus judgment of investors who divert resources to their highest marginal returns." (JCA-32).

The Appellate Division recounted the numerous actions which the Board had taken to assist Jersey Central to overcome the serious effect of the TMI disaster upon its operations. (JCA-12).

Thus, it is made manifest that in deciding the numerous issues and sub-issues presented in the various proceedings which appellant instituted before it, the Board was quite concerned with and gave such consideration as it deemed warranted to all of appellant's financial problems. Its refusal to grant all the relief appellant sought was arrived at only after careful consideration and balancing of the interests both of the utility's customers. The Board succeeded in providing revenues sufficient to maintain JCP&L's financial viability while not charging ratepayers for property which was not used and useful in the service of those customers.

**VI. The decision of the Board is not constitutionally deficient as to findings and conclusions.**

Appellant's second question presented in its Jurisdictional Statement, apparently going to the alleged absence of findings and conclusions by the Board, is obviously premised on acceptance of the validity of its initial contention that express determinations by the rate-making body as to the alleged investor-interest criteria are a constitutional prerequisite to a valid rate order. If there is no support for the latter proposition, as we believe we have demonstrated hereinabove, then it must follow that express findings of fact and conclusions of law in respect

of such criteria are not a constitutional prerequisite for a valid order.

Moreover, while it is a general principle that determinations of administrative agencies should be attended by adequate findings of fact and conclusions of law in order to enable proper judicial review of the determination, see *Permian Basin Area Rate Cases, supra,* 390 U.S. at 792, it has never been held that an administrative decision is unconstitutional because it is lacking in findings. The sole remedy therefore is a remand to the agency for proper findings, unless the reviewing court can find in the record sufficient evidence supportive of the determinations of the body under review to justify affirmance without remand. That is the case here. The decision of the Board in the present case is replete with findings expository of all the elements which the Board took into consideration in its proper balancing of the interests both of the consuming public and the utility involved.

Jersey Central's "assertions of a lack of rational explanation and policy discussion merely express its dissatisfaction with [the regulatory commission's] determination. The opinions . . . make plain that the record evidence was reviewed and the involved equities were weighed. No more is required." *NEPCO Municipal Rate Committee* v. *FERC*, 668 F.2d 1327, 1334 (D.C. Cir. 1981), *cert. den.* 457 U.S. 117 (1982).

## ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

### Introduction

As an alternative to the Motion to Dismiss, the Public Advocate also moves to affirm the New Jersey Supreme Court's decision refusing to overturn the Board of Public Utilities' decision. The Board's decision produced just and reasonable rates, balancing as it did the interests of investors and consumers, and should therefore be affirmed. In its various regulatory determinations in the wake of

the TMI accident, the Board gave ample consideration to JCP&L's investors' interests. The Counter-Statement of Facts submitted with this motion describes the positive steps that the Board took to assist in preserving the financial vitality of JCP&L in the aftermath of the accident. The Board's exclusions from rate base in the challenged decisions were justified and comport with relevant constitutional principles. See Point I *infra*. The rate of return awarded to JCP&L was generous, and JCP&L is certainly not constitutionally entitled to any higher return. See Point II *infra*. The Board correctly refused to adopt JCP&L's suggestion that rates should be awarded to the company based upon a comparison with prevailing electric rates elsewhere. See Point III *infra*.

The Appellate Division broke no new legal ground in its analysis of Jersey Central's contentions. The decision merely reaffirmed time-honored public utility law principles and applied them to the facts of the case and the BPU's decisions below.

**I. The Board used an appropriate rate base for JCP&L.**

The rate base determinations of the Board in the challenged cases were proper and indeed in compliance with any and all federal constitutional requirements when considered against the backdrop of the New Jersey case law regarding the property on which a utility is entitled to earn a return.

The New Jersey Supreme Court summed up much of current and traditional New Jersey law regarding rate base in the following paragraph from *In Re Jersey Central Power & Light Petition*, 85 N.J. 520, 428 A.2d 498 (1981):

> A rate hearing involves (a) the determination of the value of utility property (rate base) . . . In determining what property goes into rate base this

> Court has approved the 'used and useful' standard first articulated by our former Supreme Court in *Atlantic City & C. Co.* v. *Bd. of Pub. Utility Commrs.*, 128 N.J.L. 359, 365 (S. Ct. 1942), aff'd. o.b., 129 N.J.L. 401 (E.&A. 1943). *In Public Service Coordinated Transport* v. *State*, Chief Justice Vanderbilt, after stating that the determination of rate base was fundamental in any rate proceeding, defined the rate base as 'the fair value of the property of the public utility that is used and useful in the public service.' 5 N.J. at 217. We have recently reaffirmed this concept in *In re Industrial Sand Rates*, 66 N.J. 12, 22 (1974). *Id* at 85 N.J. at 529.

Accordingly, an unbroken series of New Jersey decisions over a 40-year period (knowledge of which can therefore be fairly imputed to investors in New Jersey utilities) has approved a two-pronged test for inclusion in rate base, viz., (1) utility property which (2) is "used and useful." The earlier opinion cited by the court ex-explained the rationale as follows, *Atlantic City Sewerage Co.* v. *Board of Pub. Utility Commr's.*, 128 N.J.L. 359, 366, 26 A.2d 71 (S.Ct. 1942), aff'd. o.b., 129 N.J.L. 401 (E.&A. 1943):

> A rate based upon an excessive valuation or upon *property not used or useful* in the rendition of the service subject to such regulation obviously would lay upon the individual user a burden greater than the reasonable worth of the accommodation thus supplied. [emphasis added]

As a result of the application of the "used and useful" standard, the rate base for Jersey Central does not include the investment in TMI-1, TMI-2 and Forked River. It then follows from the laws of arithmetic that setting rates so as to yield a particular numerical return on the rate base will automatically produce a lower return on the "book value" of the utility's investment in all cases, including Jersey Central's, where the utility chooses to include the investment in "nonearning assets" as part of its

"book value" on the same basis as the investment in assets which do earn a return.*

This New Jersey law is entirely consistent with federal constitutional principles set forth in the Argument in Support of the Motion to Dismiss. Jersey Central's "Hope Standards" argument is bottomed on its erroneous assumption that *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) imposed a constitutionally-based requirement on public utility commissioners to specifically and explicitly consider the impact of their rate orders on the return which will be realized on the *book value* rather than on the *rate base*, a quantity which Jersey Central characterized as its "real earnings." The Appellate Division rejected this view: "JCP&L contends that the Board should have made a finding on what its real earnings would have been as a result of the Board's order. We do not read *Hope* to require that." (JCA-34).

Jersey Central maintained that it is constitutionally entitled to rates which will produce sufficient earnings

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* The fact that regulators can, and often do, create or destroy "assets" or convert them from "earning assets" to "non-earning assets" by removing them from rate base has been officially recognized by the accounting profession. In December 1982 the Financial Accounting Standards Board issued "Statement of Financial Accounting Standards No. 71: Accounting for the Effects of Certain Types of Regulation" which requires separate accounting and disclosure for major "assets" not in rate base:

> 20. In some cases, a regulator may permit an enterprise to include a cost that would be charged to expense by an unregulated enterprise as an allowable cost over a period of time by amortizing that cost for rate-making purposes, but the regulator does not include the unrecovered amount in the rate base. That procedure does not provide a return on investment during the recovery period. If recovery of such major costs is provided without a return on investment during the recovery period, the enterprise shall disclose the remaining amounts of such assets and the remaining recovery period applicable to them.

on book value to enable it to pay what it considered adequate dividends and to attract capital on what it considered reasonable terms, irrespective of what return on rate base was implied by this level of rates. The only limitation which Jersey Central was willing to acknowledge is that the rates must not be so high as to "exploit" ratepayers. However, Jersey Central failed to cite any decisions which had applied an "exploitiveness" standard to any fact pattern or even given guidelines for such an application. Accordingly, Jersey Central decided to make up its own definition of the term and chose a criterion which involved comparing its rates with those charged by other electric utilities in New Jersey and in neighboring areas in other states (JC-8). Jersey Central alleges constitutional error in the fact that the New Jersey courts have failed to order the Board to apply this novel "comparative rate exploitation standard," and urges this Court to so order. No constitutional error was involved, as will be discussed below.

The Board has removed Jersey Central's investment in TMI-2, Forked River and TMI-1 from rate base. Each of these steps was justified and comports with the relevant constitutional principles.

**(a) TMI-2.**

TMI-2 falls squarely within the *Market Street* category of properties whose historical value no longer exists. 324 U.S. at 567. See discussion *supra* at 19 to 20. Indeed, its economic value is negative—whoever owns it has the obligation to spend over three quarters of a billion dollars merely to decontaminate it. It is only accounting legerdemain which, by keeping the financial impact of the cleanup obligation associated with ownership off the books of account, permits this "liability" to continue masquerading as an "asset."

**(b) Forked River.**

Construction on Forked River was suspended on April 4, 1979, never to resume. Jersey Central initially characterized the suspension as "temporary" but on April 1, 1980 changed the characterization to "indefinite."

The Appellate Division discussed the positions taken by the various parties and the Board's action regarding Forked River issues (JCA-11) and analyzed and rejected Jersey Central's objections thereto (JCA 38-40). In brief, Jersey Central itself proposed two rate-making approaches for treating the abandonment loss: (1) amortization over a 15 to 20 year period with a return on the unamortized balance (*i.e.*, the unamortized balance would be in rate base) or (2) amortization over 10 years with *no* return on the unamortized balance. The Board adopted the position espoused by its Staff, which was a variant of Jersey Central's second alternative, *viz.*, amortization over 15 years without a return on the unamortized balance. The difference between the Board's treatment and Jersey Central's proposal, *i.e.*, 15 year amortization rather than 10, is hardly of constitutional dimension.

Jersey Central also appealed the Board's refusal to permit it to include in its calculation of its abandonment loss an "allowance for funds used during construction" (AFUDC), *i.e.*, the carrying charges on the company's investment accrued after construction was suspended on April 4, 1979. Jersey Central itself had ceased accruing AFUDC as of April 1, 1980, the date it unilaterally declared the suspension to be "indefinite," but claimed to be entitled to accrue AFUDC during the period when the suspension was "temporary." The Board agreed with the Public Advocate that the issue was very simple: When a project is suspended *de facto* and, without work ever resuming, is later unilaterally declared to be suspended *de jure*, is a utility entitled to collect AFUDC monies from ratepayers for the time period between the *de facto* and *de jure* suspension dates? To ask the question is to answer it.

**(c) TMI-1.**

TMI-1 has been out of service for five years and faces an uncertain future. At this point in time, it is not clear when, or even whether, the Nuclear Regulatory Commission will permit the plant to reopen, at least under its present ownership and management. Its status can fairly be characterized as being in limbo. The Board's regulatory treatment of TMI-1 is and has been appropriate to the situation.

TMI-1 remained in rate base for a year after the TMI accident, but was removed from rate base as not being "used and useful" after a year had elapsed and its prospects for expeditious return to service had dimmed. The Board ordered the removal from rate base in order to protect Jersey Central's ratepayers from continuing to shoulder a double financial burden for the costs of the plant and for the power purchased to replace the idle plant's output. This action, and its underlying rationale for balancing the interests of ratepayers and of investors —ratepayers paying for replacement power and investors for the costs of the idle plant—was specifically approved by the New Jersey Supreme Court in *In re JCP&L Petition*, 85 N.J. 520, 530-31, 428 A.2d 498 (1981). The rationale remains compelling, and certainly the longer the unit remains out of service the more equitable the sharing formula seems. It should be noted that the Board has taken steps to mitigate the situation somewhat for the investors by allowing Jersey Central to cease accruing depreciation on the unit and in fact to reverse the accruals back to the time the unit was removed from rate base (JCA-86) and by committing itself to expeditiously reexamine TMI's rate base status when and if the unit returns to commercial operation (JCA-95 to 96).

## II. The Board used an appropriate rate of return.

Jersey Central argued in the Appellate Division that the Board should have increased the allowed rate of return to compensate for reducing the rate base. The Appellate Division properly rejected this as circular reasoning:

> Once TMI-1 was taken out of the rate base, it would not have made sense to raise the rate of return because the utility was not entitled to a rate of return on property which was not part of the base. If the rate on the remaining property could be increased to make up for the loss of TMI-1, the effect would be the same as leaving TMI-1 in the rate base. Such would create a rate based upon property not part of the rate base and could produce an unreasonable rate of return. Accordingly, we conclude that the failure to increase the rate of return merely because TMI-1 was taken out of the rate base did not render the rate of return unjust or unreasonable (JCA-33).

It must be recognized that the rate base removals which took place were of abandoned projects and property which had been rendered no longer used and useful as a result of an accident. These are precisely the type of removals which investors could have, and presumably did anticipate —they have been compensated in the past through the allowed rate of return for assuming the risks of such removals. Had the Board increased the allowed return, the situation would have been analogous to the one described in *Washington Gas Light* v. *Baker*, 188 F.2d 11, 19-20 (D.C. Cir. 1950), *cert. den.* 340 U.S. 952 (1951):

> [T]he investor would be paid for the occurrence of the very eventuality the risk of which he had been consciously carrying and for which he had already been paid. The effect upon the consumer would be the same as if an insured person were required to assume the loss against which he believed himself protected by payment of premiums. *The result would clearly violate the consumer interest against "exorbitant" rates.* (emphasis added)

In speaking of "risk," it is vital to distinguish, as did the *Baker* court, between the "premium" and the "loss" which actually occurs. The premium can be much smaller than the loss if whoever sets the amount of the premium thinks that a loss of that magnitude is extremely unlikely and discounts its occurrence heavily. For example, the rate of return which investors demand in order to invest in Pacific Gas & Electric ("PG&E") presumably, among other things, compensates investors for assuming the risk that the service territory, together with their investment, will be devastated by an earthquake. The fact that PG&E's rate of return is nevertheless comparable to that of other utilities in areas with no recorded earthquake history merely shows that the premium demanded is infinitesimal.

In the instant proceedings, every one of the Board's actions regarding rate base reflected only the application of settled law to recognized risks. Thus, investors have been compensated all along for assuming the risk that projects would be abandoned and that accidents would occur at nuclear power stations. The accident at TMI demonstrated that nuclear accidents were more likely to occur and could result in more extensive damage than many investors had assumed, but the accident risk is one which faces all nuclear utilities and which is presumably now reflected in allowed rates of return for these utilities. It does not present a risk which is peculiar to Jersey Central and for which it requires extra compensation as compared to, say, Public Service Electric & Gas Co. Another response by the nuclear and utility industries to the TMI accident was to increase property insurance and replacement power insurance coverages. The premiums for these types of insurance are now part of the rates so investors are protected by this explicit insurance mechanism as well as by the implicit protection in the allowed rate of return. There was absolutely no reason for the Board to allow a higher rate of return than the one which it allowed in order to compensate for the removal of property which was not used and useful.

**III. The Board properly recognized that Jersey Central's novel "comparative rate exploitation standard" was flawed.**

Jersey Central has continually maintained that the consumer interests are adequately protected as long as the rates are not so high as to "exploit" consumers. However, the company has failed to cite a single decision which actually applied an "exploitiveness" standard to a particular factual situation or even provided guidelines for such an application. Faced with this vacuum, Jersey Central chose to invent its own standard, which can be characterized as the "comparative rate" standard for "exploitation". The following is a typical formulation:

> ". . . Jersey Central presented unchallenged evidence that, even if its requested rate increases were granted in full, Jersey Central's rates would be in line with those of customers of other utilities in New Jersey and neighboring areas. (See, e.g., Appendix, pages A-49 through A-52). Neither the orders of the Board nor the decision of the Appellate Division suggested that the rates sought by Jersey Central would "exploit" its customers." (JC-9)

There are serious flaws associated with the use of a "comparative rate" standard to measure consumer "exploitation" and the justness and reasonableness of rates.* One of them was pointed out by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) in rejecting a contention that deriving area rates from prevailing contract prices would appropriately protect consumer interests and relates to the fact that the demand for utility services is relatively unresponsive to price increases:

> The first issue is whether the Commission properly rejected the producers' contention that area rates

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* Appellant fails to recognize that Jersey Central's rates have risen substantially since the TMI accident and far more substantially than they would have but for the accident.

should be derived from field, or contract, prices. The producers have urged that prevailing contract prices provide an accurate index of aggregate revenue requirements, and that they are an appropriate mechanism for the protection of consumer interests. . . .

. . . [*C*]*onsumers have been left without effective protection against steadily rising prices. Their alternative sources of energy are in practice few, and the demand for natural gas, particularly in California, is therefore relatively unresponsive to price increases.* The consumer is thus obliged to rely upon the Commission to provide a complete, permanent and effective bond of protection from excessive rates and charges. (Citations omitted) (Footnotes omitted) (Emphasis added) 390 U.S. at 792-95.

Because of this insensitivity and the fact that each utility has an exclusive franchise area, merely comparing the rates charged by different utilities reveals nothing about the justness and reasonableness of any of them. Wide disparities in rate levels can, and do, exist side by side and persist over long periods of time (JCA-49 to -51). This is the reason why electric utilities are regulated in the first place; the consumer is obliged to rely on the regulators to "provide a complete, permanent and effective bond of protection from excessive rates and charges," *Id.*, which, left to their own devices, utilities could and would impose.

Jersey Central's approach raises more questions than it answers and would be unworkable. Would it introduce a "most favored nation" approach to ratemaking? Would granting an increase to the utility with the highest rates in the sample provide support for rate increases by other utilities? Could ratepayers in service territories where rates are high stand Jersey Central's argument on its head and contend that they are being exploited? Would a commission have to make findings in every rate case as to how the rates charged compared with those of other

utilities? And what would be the appropriate geographical area and time period for such a comparison? In short, there are serious methodological and procedural problems associated with the use of Jersey Central's novel standard. It should not be introduced into ratemaking.

## CONCLUSION

Appellant has failed to present in this appeal a substantial federal question and for this additional reason this Court should grant Appellee Rate Counsel's Motion to Dismiss this appeal. In addition, this Court should grant this Appellee's Motion to Dismiss or Affirm because in the decision appealed from the New Jersey Supreme Court properly refused to review an affirmance, by the New Jersey Appellate Division, of a decision of the Board of Public Utilities of the State of New Jersey which was just and reasonable and entirely consistent with federal and state constitutional principles.

Respectfully submitted,

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## APPENDIX A

### Decision and Order of the Board of Public Utilities (April 1, 1980)

[Seal]

STATE OF NEW JERSEY
DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 Raymond Boulevard
Newark, New Jersey 07102

4/1/80
LEGAL

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IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN APPROVAL OF AN AMENDMENT OF ITS TARIFF FOR ELECTRIC SERVICE AND FOR AMENDMENT TO THE ENERGY ADJUSTMENT CLAUSE AND FACTOR IN SAID TARIFF FOR SUCH SERVICE.

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DECISION AND ORDER

DOCKET NO. 795-427

(Phase II)

Kirsten, Friedman & Cherin, Esq. by Jack B. Kirsten, Esq., William F. Hyland, Esq. of Counsel and James

*Appendix A*

B. Liberman, Esq., of Counsel 17 Academy Street, Newark, New Jersey for Jersey Central Power & Light Company

Leonard A. Peduto, Jr., Esq., Deputy Attorney General, Louis McAfoos, Esq., Regulatory Officer.

Alfred L. Nardelli, Esq., Raymond E. Makul, Esq., and Menasha Tausner, Esq., 10 Commerce Court, Newark, New Jersey for the Division of Rate Council.

Waters, McPherson, Hudzin & McNeill, Esqs., by David A. Waters, Esq., and Nicholas Filocco, Esq., 32 Journal Square, Jersey City, New Jersey, for the New Jersey Department of Energy.

Berry, Summerill, Piscal, Kagan & Privetera, Esqs., by Francis P. Piscal, Esq., and John C. Sahradnik, Esq., Toms River, New Jersey 08753, for the County of Ocean.

Conway, Reisman, Bumgardner, Huley & Kleinfeld, Esq., by Nicholas W. Mattia, Jr., Esq., Newark, N.J. for the N.J. Utilities Association.

BY THE BOARD:

The Board in this proceeding has confronted a variety of regulatory issues related to the Three Mile Island accident of March 28, 1979. Of immediate concern in this phase of the proceeding is the determination as to whether or not TMI-1 continues to be used and useful as a rate base inclusion for the purpose of setting utility rates.

*Appendix A*

On January 21, 1980, Jersey Central Power & Light Co. (petitioner) filed a petition for an increase of $142 million in the company's LEAC (Docket No. 801-45). As a result of agreements among the parties, that petition was bifurcated into non-TMI energy replacement costs ($105 million) and TMI energy replacement costs ($37 million).

The Board on March 6, 1980 issued a Decision and Order in Docket No. 801-45 awarding the company $84.2 million of non-TMI related energy costs. (The Decision and Order adopted Judge McGill's Initial Decision which was based on a stipulation among the parties).

In its Decision and Order of March 6, 1980, in Docket No. 801-45, the Board specifically directed Judge McGill to limit his investigation of the TMI-related replacement energy costs to just those costs and not to take evidence on the issue of whether TMI-1 was used and useful:

> The issue of whether Three Mile Island-1 continues to be "used and useful" is reserved to the Board. The Board will commence investigation of this issue shortly. The Board will set oral argument on the issue of "used and useful" as it applies to TMI-1 to determine an appropriate scope for resolving this issue as well as the appropriate forum for such investigation.[1]

In its June 18, 1979 Decision and Order in this docket, the Board allowed TMI-1 to be continued in rate base even though TMI-1 was temporarily unavailable given

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[1] Decision and Order, Phase I, OAL Docket No. PUC 636-80, BPU Docket No. 801-45, *In the Matter of the Petition of JCP&L Company for an Increase in its Levelized Energy Adjustment Charge*, p2.

that it was likely to come back on line in the foreseeable future. However, the Board indicated that it would allow TMI-1 to be included in rate base until January 1, 1980. At that time, the Board would reexamine the status of TMI-1, and, if necessary, address the question of whether TMI-1 continued to be used and useful.

Public hearings were held on March 19, 21, 24 and 25, 1980, before President Barbour and Commissioner Hynes. Testimony was provided by witnesses for the petitioner and the Public Advocate. Position papers were filed with this Board by Petitioner, the Public Advocate, the Department of Energy, Ocean County, and the Board's Staff.

In its petition of January 21, 1980, JCP&L calculated TMI-related replacement energy costs on the premise that TMI-1 would continue to be unavailable, and, therefore, the company would consequently be asking ratepayers to pay for both the capital and operating expenses of TMI-1 and the replacement energy costs associated with that Unit. Clearly, the Board has the jurisdiction and responsibility to raise the question: should ratepayers be required to pay both the capital and operating expenses of TMI-1 and the replacement energy costs related to that Unit.

On March 24, 1980, Administrative Law Judge McGill conveyed to the Board his Initial Decision in Phase II of Docket No. 801-45. In that Initial Decision, he recommended that JCP&L be awarded $34.2 million of the $37 million request for TMI replacement energy costs. (It should be noted that the $34.2 million recommendation was agreed to by all parties as reasonable.)[3] Therefore, the

[3] See Direct Testimony of Public Advocate witness Knudsen, RCT-1, p.1.

Board is compelled to address the issue of TMI-1's present status since the Unit has not returned to service and the company is attempting to continue recovering in base rates the effect of TMI-1 in rate base, while at the same time, recovering from ratepayers replacement energy costs associated with the Unit.

*"Used and Useful" Standard: TMI-2*

In its June 18, 1979, Decision and Order in this docket the Board determined that as a result of the severe damage to TMI-2, that unit was unlikely to return to service for a period of 2 to 4 years, if ever.[8] Given that finding, the Board concluded that TMI-2 was no longer used and useful for ratemaking purposes. The Board ordered that ratepayers should not be required to pay the capital and operating expenses associated with that unit. The Board determined that JCP&L be permitted to recover $98.3 million in replacement energy costs over an 18-month period. On an annualized basis, the Board granted JCP&L in increase in LEAC revenues of $74.7 million and reduced base rates by $29 million related to the removal of TMI-2 from rate base. This authorized the utility to earn additional operating revenues of $45.7 million. The basis for this action was that ratepayers should not be required to pay both the replacement energy costs related to TMI-2 and the capital and operating expenses associated with TMI-2 which was determined not to be used and useful

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[8] The Board is aware that GPU has commissioned studies relating to TMI-2. Of particular note is the study made by Bechtel Power Corporation which indicates on a preliminary basis that for planning purposes TMI-2 could be ready for restart in mid-1983 (under ideal regulatory conditions).

for an extended period. This constituted, in the Board's opinion, an equitable sharing of the immediate costs of the accident (at least as measured by replacement energy costs).

*"Used and Useful" Standard: TMI-1*

TMI-1 did not return to service on January 1, 1980 as contemplated and continues to be unavailable for a variety of serious regulatory and technical reasons.[4] Absent action by this Board, the ratepayers of JCP&L would face the prospect of paying the replacement energy costs associated with TMI-1 and the capital and operating expenses associated with the unit. It is the Board's determination that petitioner's approach is inconsistent with the equitable sharing principle set forth earlier in regard to TMI-2.

Furthermore, petitioner's approach would violate a basic premise of public utility ratemaking, which prohibits a utility from earning a return on property which is not used and useful in rendering utility services for a considerable period of time.

The record in this proceeding clearly indicates that the uncertainty associated with the future availability of TMI-1 has increased. The ongoing proceedings before the NRC are comprehensive and incorporate complex considerations, some of which have never before been litigated. Further, questions have been raised by the NRC regarding the ability of Metropolitan Edison Company (Met-Ed), the operator of TMI to safely control the condition of TMI-2 while at the same time having the responsibility

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[4] See Direct Testimony of JCP&L witness R.C. Arnold (JC-1).

of operating TMI-1. These questions relate both to the financial and technical ability of Met-Ed to safely operate the TMI facilities.[5] In addition, it is not clear when all of the necessary modifications to TMI-1 will be completed and approved by the NRC. It is therefore apparent that TMI-1, out of service for the past year, will be out of service for at least a total of two years.

On the basis of the foregoing and a full review of the record, the Board is compelled to find that TMI-1 is not at the present time used and useful and should not be included in rate base. Therefore, ratepayers should not continue to bear the burden of the capital charges and operating expenses associated with that unit until such time as the unit is returned to service. *Public Service Coordinated Transport* v. *State of New Jersey,* 5 N.J. 196 (1950), *In re Intrastate Industrial Sand Rates,* 66 N.J. 12 (1974).

However, the Board recognizes that all reasonable replacement energy costs associated with TMI-1 should be paid by ratepayers. Therefore, the Board by its Order in the companion docket No. 801-45 has today granted JCP&L $34.2 million of additional LEAC revenues. The removal of TMI-1 from rate base in this docket results in a base rate reduction of $17.9 million annually. The reasoning that has been applied to TMI-1 and TMI-2 is consistent with sound regulatory policy and clearly effectuates the Board's sharing concept regarding the costs of the accident.

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[5] See NRC Order CLI-80-5 (Docket No. 50-289) for a list of specific issues to be addressed by the Atomic Safety Licensing Board prior to TMI-1 restart.

*Appendix A*

An argument raised by the utility should be addressed. The utility argues that the Board may only lawfully direct a decrease in Jersey Central's base rates after first determining that the present rates are in excess of the just and reasonable standard. The utility cautions that a determination regarding just and reasonable rates can only be made after the Board has evaluated, pursuant to N.J.S.A. 48:2-21, the reasonableness of the utility's overall rate of return in relationship to its rate base, income and expense profile.

Of course, today's Order does not result in a reduction of the company's rates. We consider the company's position to be a narrow interpretation of the Board's statutory authority, of the record of this case, and of the continuing procedural and substantive regulatory surveillance which the Board has placed upon this utility, its financial health and its ability to provide service.

The Board in exercising its jurisdiction has, frequently, granted on a provisional basis, rate relief pending a final Decision in a complete rate case and has granted an increase in operating revenues for LEAC's pending ultimate reconciliation in a future rate case. *In the Matter of Petition of the Atlantic City Electric Company,* (Docket No. 796-683) Decision and Order, September 19, 1979. In a companion case also decided today, a provisional LEAC increase is granted. Docket No. 801-45.

Aside from the fact that there is no actual reduction in base rates (due to a permitted acceleration of the Company's deferred energy expenses in an amount sufficient to maintain the rates at their existing level) the record is clear in showing that the nuclear unit in question has not, is not and will not, for a foreseeable period,

be providing services to the customers of this utility. Although this facility may have been a prudent investment and may become useful in the future, it should not at present be included in rate base. Rate base should not be constructed on conjecture as to future conditions. We remove this facility from rate base due to present conditions and the future as far as can be ascertained. *In Re Red River Power* 12 PUR (N.S.) 355.

The question as to the utility's rate of return is one which the Board will consider on application by petitioner or, if necessary, on its own initiative. In such a petition, which we are advised is to be filed shortly, we will consider the just and reasonable aspects of the utility's existing rate structure vis a vis its rate base, operating income and expenses. The Board is properly authorized pursuant to N.J.S.A. 48:2-21 and 48:1-21.1 as interpreted in the Supreme Court's Decision and in *Revision of Rates of Redi-Flo Corporation*, 76 N.J. 21 (1978) and *In re Board's Investigation of Telephone Cos.*, 66 N.J. 476 (1975) both to raise and lower rates on a provisional basis after notice and hearing upon an adequate record—which is to be tied to appropriaite rate base and rate of return findings in a "full blown" rate case. The umbilical cord will be tied between this and its companion case and appropriate final statutory findings on rate of return, rate base, and just and reasonable rates.

*Financial Condition of the Company*

The current financial condition of JCP&L is serious given the tremendous cash requirements imposed on it by the need to purchase substantial replacement energy to replace the capacity lost due to TMI-1, TMI-2, and

Oyster Creek being out of service. In particular, it is expected that its existing lines of credit under the Revolving Credit Agreement (RCA) and with territorial banks may be reached or exceeded during the summer or early fall.

It is uncontested in this record that JCP&L currently has access to only three sources of funds:

(1) Lines of credit under the RCA ($139 million) and territorial banks ($7.5 million) lines of credit.

(2) JCP&L ratepayers.

(3) Capital contributions from GPU.

With respect to (1), the combined limit is estimated at $146.5 million. However, the representatives of the co-agent banks have indicated that the banks in the RCA may not allow JCP&L to draw down, existing lines of credit if a materially adverse regulatory change occurs either in Pennsylvania or New Jersey. With respect to (2), JCP&L ratepayers have had to assume $199.9 million of increased rates since the accident with the prospect of further increases associated with the serious inflationary problems facing the entire nation. There is a need to balance the burden placed on these ratepayers, if at all feasible, consistent with the maintenance of JCP&L as an ongoing concern. With regard to (3), there is some prospect that the parent company GPU may be in a position to make a capital contribution to JCP&L from the proceeds of loans available under the RCA. However, it is obvious that this availability of funds is uncertain and contingent on the banks' reaction to regulatory action taken in New Jersey and Pennsylvania.

All parties have agreed that JCP&L cannot presently sell long-term debt or preferred stock and that GUP can-

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not sell common stock given the financial conditions of the respective companies.[*] This is in stark contrast to the situation following the June 18, 1979 Order removing TMI-2 from rate base wherein JCP&L was shortly thereafter able to sell nearly $100 million of First Mortgage Bonds to a variety of institutional investors as well as execute the RCA.

The Board clearly recognizes the serious financial condition of JCP&L. This Board will endeavor to work toward the preservation of JCP&L as an ongoing concern to avoid the potential devastating impact of insolvency or bankruptcy. Numerous witnesses before this Board and the Pennsylvania Public Utility Commission have persuasively argued that the consequence of involuntary insolvency or bankruptcy would be detrimental to the ratepayers, the economy of New Jersey, the other utilities in New Jersey, as well as the security holders of the affected companies. We clearly recognize our responsibility to attempt to preserve the economic and service viability of JCP&L. Alternatives to the current structure of JCP&L (if they exist) cannot be imposed upon ratepayers without careful deliberation and extensive analysis. Our ongoing commitment to the Strategic Options Study should be a clear message to all parties and the financial community that this Board will continue to exercise its regulatory responsibilities in a rational and deliberative fashion.

It is apparent from the review of the record before us that a significant number of financial indices related to JCP&L are at critically low performance levels. These

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[*] Subsequent to the closing of the record on March 25, 1980, Moody's Investor Service downgraded the securities of JCP&L from a Baa rating to a Ba rating.

indices indicate that JCP&L will for some time be unable to access traditional sources of capital. Absent access to these sources of capital, the company will be hard-pressed to maintain a construction program that is required to provide continued safe, adequate, and proper service pursuant to N.J.S.A. 48:2-23. In the past, the Board has recognized these conditions as a foundation for emergency interim rate relief pursuant to N.J.S.A. 48:2-21.1. In particular, in JCP&L Docket No. 743-184 the Board recognized the dire financial condition of this utility resulting in its inability to finance required construction through traditional capital markets and therefore provided emergent relief.

*Deferred Energy*

Since the accident, JCP&L has built up a substantial balance of deferred energy charges (approximately $80 million). Obviously, these balances need to be addressed by this Board in future proceedings involving JCP&L. Reasonable replacement energy costs should be borne by the ratepayers if, in fact, this is the lowest cost method of providing safe, adequate, and proper service during this period of financial stress.

At the present time, the Company is facing a severe cash flow problem. The Board must address that problem directly. The Company is presently amortizing over 22 years some $51.4 million of deferred energy costs incurred prior to the TMI accident. In order to mitigate the short run impact of removing TMI-1 from base rates, the Board has determined an immediate need to accelerate the recovery of these pre-TMI energy costs. This unprecedented action is in direct response to the critical cash

flow problems faced by this company. When TMI-1 is returned to service, the Board will reevaluate the effects of the accelerated amortization based on the financial conditions at that time.

*Additional Regulatory Considerations*

It should also be noted that if and when TMI-1 is returned to service, the Board will expeditiously return the unit to rate base. The Board's primary concern is that the ratepayers of JCP&L continue to receive safe, adequate and proper service. The Board will attempt to minimize the cost of that service and, at the same time, continue its efforts to maintain JCP&L as an ongoing concern.

The Board has urged the NRC to allow the restart of TMI-1 as long as public health and safety aspects of the restart were resolved satisfactorily. The State of Pennsylvania has similarly argued that economic consequences of potential delay are contrary to the public interest. We again urge the NRC to recognize the economic and service consequences of further slippage in commencing the restart docket.

The Board is also concerned with the continued outage of the Oyster Creek Nuclear Unit. Each month's delay in returning this unit to service will cost JCP&L approximately $14 million in additional replacement energy costs. As of February 29, 1980, JCP&L purchased over 75 percent of its total sources of energy. This heavy reliance on purchased power clearly indicates the company's need for additional base load capacity.

The Board is proceeding with Arthur Young & Company in the execution of the Strategic Options Analysis.

*Appendix A*

Recent financial and operating problems compel us to accelerate the timetable for the Analysis in order to be prepared for critical decisions in the next several months. We are hopeful that a viable strategy will emerge which can be implemented to mitigate the forthcoming impacts of substantial rate increase requests. Resolution of JCP&L's problems will require an all-out effort to fully evaluate the relevant options and determine a reasonable State response to these critical problems. The welfare of over 690,000 customers bears heavily on these deliberations and will be a key factor in any option identification and implementation.

In addition, the Governor has commissioned this Agency to undertake certain important responsibilities with respect to the treatment of electric utility rate cases now pending. His detailed statement attached to the filing of Assembly Bill 3037 without approval, outlines a comprehensive approach to the question of the feasibility and rate impact of potential conversion of planned and proposed nuclear facilities to coalfired facilities.

This mandate has an impact on the rate applications of Jersey Central Power and Light and will require additional data submissions.

The Board is charged with two responsibilities. The first, which has application here, is that in electric utility rate cases now pending and to be filed, the Board must evaluate the impact on rates of nuclear facilities now under construction as compared to alternative coal-fired facilities. The Governor specifically notes that these are quasi-judicial proceedings, affording all parties the right of introducing evidence and witnesses, cross-examination and the like.

It is, therefore, incumbent that this Petitioner in its forthcoming base rate application prepare a detailed submission on the rate impact of placing in service nuclear power facilities now under construction as compared to the impact of similar capacity coal-fired facilities. This would include a submission as to Forked River. TMI-II is out of service, however, the potential rate impact of possible conversion to coal of this facility should also be included for Board analysis Petitioner and other parties will be further advised as to the procedures to be followed with respect to fulfilling the Governor's mandate as it relates to these rate matters and any to be filed.

Therefore, based on our evaluation of the record in this proceeding, the Board *FINDS*:

1) Given the extended period of unavailability and the impossibility of ascertaining when the unit may return to service, TMI-1 is not used and useful in supplying energy and should be removed from rate base. This results in a reduction of $17.9 million in base rates.

2) The unamortized balance in petitioner's deferred energy account, accumulated prior to the TMI accident, is $51.4 million as of March 31, 1980.

3) The company's financial needs are such that to insure its ability to continue to provide safe, adequate and proper service, the pre-TMI deferred energy account should be amortized over an accelerated period.

Therefore, based upon the foregoing, the Board *HEREBY ORDERS* that:

*Appendix A*

1) Three Mile Island Union No. 1 be removed from the rate base of petitioner effective April 1, 1980;

2) Petitioner file a schedule showing the accelerated amortization of the pre-TMI deferred energy account equivalent to $17.9 million of additional annual revenue (adjusted to provide for revenue taxes) to be effective as of April 1, 1980.

DATED: April 1, 1980

(SEAL)

BOARD OF PUBLIC UTILITIES
BY: (SIGNED)

George H. Barbour
President

Edward H. Hynes
Commissioner

ATTEST:

(SIGNED)

Gerald A. Calabrese
Secretary

# APPENDIX B

**Decision and Order of the Board of Public Utilities (June 18, 1979)**

[SEAL]

STATE OF NEW JERSEY
DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 Raymond Boulevard
Newark, New Jersey 07102

6/18/79
LEGAL/RATES

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF FOR ELECTRIC SERVICE AND FOR AMENDMENT TO THE ENERGY ADJUSTMENT CLAUSE AND FACTOR IN SAID TARIFF FOR SUCH SERVICE.

DECISION AND ORDER

DOCKET NO. 795-427

Appearances Attached:

*Appendix B*

BY THE BOARD:

On May 4, 1979, Jersey Central Power & Light Company, a public utility of the State of New Jersey, subject to the jurisdiction of the Board, pursuant to N.J.S.A. 48:2-13, submitted a revision of rates pursuant to N.J.S.A. 48:2-21 to become effective June 1, 1979.

This petition arises out of the events which occurred on March 28, 1979, at the Three Mile Island Nuclear Generating Station Unit No. 2 located in Middletown, Pennsylvania, of which the company is a 25% owner. The Company's proposed revised tariff, based upon the normalized test period of twelve months ending December 31, 1979, provides for no increase in base rates. The proposed rates provide for an amendment of its Levelized Energy Adjustment Clause (LEAC) presentely at .755 mills per kwh and establishment of a new energy adjustment factor of 9.375 mills per kwh, which will increase its gross annual revenues by $113 million.

Because of the emergent nature of this application, the Board scheduled expedited hearings commencing on May 21, 1979.

A number of parties intervened to contest the proposed increase in the Levelized Energy Adjustment Clause. These parties were Department of Public Advocate, Department of Energy, Ocean County Board of Chosen Freeholders, New Jersey Chapter of the National Association of Water Companies, Air Products and Chemicals Company, New Jersey Public Interest Research Group, United States Department of Defense and the Staff of the Board of Public Utilities. The petitioner presented direct and rebuttal testimony. Dr. Fred Grygiel, Chief Public Utility

Economist and Anthony J. Zarillo, Executive Officer, testified on behalf of the Staff of the Board and the Department of Energy presented direct and rebuttal testimony. Additionally, at the Board's request, Aaron Levy, Esq. of the United States Securities and Exchange Commission testified solely on the question of reorganization and bankruptcy.

The Board conducted nine days of evidentiary hearings, and four separate evening hearings in the company's service area for the purpose of hearing public witnesses. Oral argument was held before the Board on June 14, 1979 at which time the active parties presented arguments regarding their positions.

After a full and complete review of the entire record in this matter, the Board has determined that the position of the Staff of the Board of Public Utilities is the proper one to be followed in this matter and we will, therefore, adopt it in this decision.

On May 23, 1979, the Board ruled (TR-384) that the issue of fault regarding the accident at Three Mile Island Unit 2 would not be one that would be considered in its determination of this phase of the case. We affirm that ruling for the very practical reason that numerous agencies, commissions and committees are actively pursuing this issue and it is unlikely that a relatively certain determination on this complex issue will be arrived at in the near future.

The issue of reorganization or bankruptcy has arisen in this case due to the financial strain caused by the TMI incident. Although we have considered the testimony of Mr. Levy of the Securities and Exchange Commission as well as the testimony of other witnesses, the Board at this time

believes that the question of bankruptcy is not a viable alternative for this company. A trustee in bankruptcy would have the same monumental financial problems to confront as current management. The costs of replacement energy would still be present and the trustee would still have to come to this Board for relief. Reorganization or bankruptcy would benefit no one, either the company or the ratepayer, and would only serve to endanger the ability of JCP&L to provide adequate and proper service.

*Rate Base Treatment of TMI-1 and TMI-2*

Jersey Central Power and Light Company (JCP&L) has proposed to forego and return on one-half the equity investment in the Three Mile Island Two plant. The Company states that this proposal results in an equitable sharing between the ratepayers and shareholders of the financial impact caused by the unavailability of this plant (Exhibit JC-200). The Board's Staff and all other parties have joined in opposition to this position.

Staff argues that the Board should exclude from rate base TMI-2 and the related operating expenses, which will reduce the revenue impact of TMI-2 in the granting of any rate relief. The effect of this recommendation is to reduce the company's existing base rates by $29 million. (TR-1162, Ex. JC-218). They contend that the record shows the plant will not be used and useful in providing electric generating service for a period of at least 2 to 4 years, if ever.

In proposing a recovery of purchase power costs, the Staff testified that if the company were allowed to recoup TMI-2 capital and operating costs through base

rates, in addition to recovering the TMI replacement energy costs, there would be a double burden on utility customers. In the Staff's view this would represent an unfair sharing of these costs. All other active intervenors agreed with this staff position.

The Board adopts the Staff's position on this issue. Therefore, TMI-2 will be treated as a facility that is not used and useful in providing service to the utility's rate payers. This determination by itself results in a reduction of base rates by 29 million dollars.

Insofar as TMI Unit No. 1 is concerned, the Board finds that the outage of this facility is of a temporary duration. The record indicates that this unit may be placed back in commercial operation to provide service to its customers as early as August 1979. Furthermore, all calculations in determining replacement energy costs were based upon TMI-1 returning to commercial service as of January 1, 1980.

*LEAC FACTOR*

The major issue in this case is the replacement energy costs resulting from the TMI incident.

The level of replacement energy costs has been set out in JC-206(a), page 3 and JC-206, table D. These exhibits indicate that for the 21-month period from April 1, 1979 to December 31, 1980, replacement energy costs are estimated by the company to be $138 million. The company, reduced them to give effect to savings from purchase power agreements with Allegheny Power Systems, Philadelphia Electric and Pennsylvania Power and Light Company of approximately $16 million, resulting in a revised

level of estimated replacement energy costs of $122 million.

It is Staff's position that the company will realize additional savings of $17 million of estimated replacement energy costs through the incentives that Staff proposed and purchased power agreements under negotiations. These savings could be accomplished through the ability of the Company to recover capacity charges through the LEAC; by extension of the existing agreements noted above; and by additional capacity purchases that are being negotiated with Ontario Hydro, Northern Indiana Power and Public Service of Indiana.

Further, the staff notes that company witnesses have testified that TMI-1 could return to commercial service as early as August, 1979. Staff used a service return date of January 1, 1980. Should TMI-1 return to service prior to this date, the company could realize additional savings of approximately $5.5 million per month. While staff has not included this in its calculation, such an eventuality would put the company in an even better cash position. Therefore, the staff contends that the company's estimated replacement energy costs could be reduced to approximately $105 million based on the Staff's assumptions. Staff, through Messrs. Grygiel and Zarillo concluded that the company's estimates did not give effect to the incentives and opportunities identified and recommended in their testimony.

Staff also contends that $7.3 million should be used to further reduce the company's estimate of replacement energy costs. This amount represents an adjustment in recognition that the ratepayers, through the Staff's proposed LEAC, will be paying replacement energy costs from the date of the accident to July 1, 1979, the effective date of the proposed LEAC factor.

*Appendix B*

The company has proposed a 14-month period of replacement energy costs to be recovered over 12 months. The Staff, on the other hand, used the company's estimate of replacement energy costs for the 21-month period (April, 1979 to December, 1980) to be recovered over 18 months.

Due to the magnitude of the incident and its extraordinary nature, the 18-month time frame must be considered reasonable. The Board is persuaded by Staff's argument on this issue. We view the contemplated reduction of $17 million as a reasonable possibility. Therefore, we adopt Staff's recommendation that 98.3 million dollars of replacement energy costs be recovered by JCP&L over a period of 18 months. This is consistent with prior Board practices in allowing extraordinary expenses to be recovered over an extended period of time. While the Advocate and other intervenors have suggested a period of anywhere from 36 to 60 months, the Board considers the 18 month proposal most reasonable.

The Board also adopts the staff recommendations on the inclusion of the capacity charges related to the TMI incident in the calculations of the LEAC. This treatment is being permitted, in this limited instance, to provide an incentive to JCP&L to actively pursue all possible cost reducing purchased power agreements. Any capacity purchase successfully negotiated, that has associated with it a capacity charge should be treated as part of the net fuel cost savings and flowed through the LEAC.

With the allowance of the Staff's proposed LEAC factor of 6.275 mills per kwh and a removal of TMI-2 from base rates, the company will realize approximately $45 million in additional annual revenues.

*Appendix B*

*Dividends*

The issue of suspending the Jersey Central Power and Light dividend is vexing. The company through its witnesses, has testified that to pass a dividend will be viewed by the financial community as a negative sign and could seriously jeopardize its ability to obtain lines of short-term credit through the proposed Revolving Credit Agreement and limit its access to long-term capital markets.

The staff has recommended to the Board that it order Jersey Central not to pay to General Public Utilities Corporation (GPU) some 35 million in dividend distributions during the balance of 1979. This action would, in the Staff's opinion, conserve Jersey Central's vital cash resources, and assist the petitioner in its efforts to secure longterm financing. (Exhibit BPU Staff 100).

Under ordinary circumstances, the general authority to regulate the rates and service of a public utility company does not comprehnd the power to interfere in the internal affairs of the corporation, *N.J. Bell Tel. Co.* v. *Bd. of Pub. Utility Commrs.* 12 N.J. 568, 590 (1958); *Passaic Consolidated Water Co.* v. *Board of Public Utility Comm.*, 5 N.J. Misc. 1078, 1081-1082 (Sup. Ct. 1927) aff'd 104 N.J.L. 666 (E. & A. 1928); *State of Missouri ex rel Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri,* 262 U.S. 276, 289, 43 S. Ct. 544, 547, 67 L.ed 981, 985 (1923). The management of a utility is charged with responsibility of operating the assets of the corporation for the benefit of its shareholders; the regulatory commission supervises such operation to assure the promotion of the public interest. Because utility property remains private property, a regulatory commission is often precluded from exercising its authority in a way

which would interfere with those important rights and incidents of private ownership vested in management. Nevertheless, where the policy of a utility company's management collides with the public interest, such rights and incidents of private ownership must yield to the paramount concerns of the State. Accordingly, even management's prerogative to declare and pay dividends to shareholders is not sacrosanct, when to do so would affect the utility's ability to render safe, adequate and proper service, see *Public Service Commission* v. *Jamaica Water Supply Company,* 42 N.Y. 2d 880, 397 N.Y.S. 2d 784, 366 N.E. 2d 872, Ct. App. 1977 aff'd o.b. 54 A.D. 2d 10, 386 N.Y.S. 2d 230 (3rd Dept. 1976); See also *State ex rel Kansas City Transit, Inc.* v. *Public Service Commission,* 405 S.W. 2d 5, 11-12 (Mo. Sup. Ct. 1966) (en banc). In his decision for the intermediate appellate tribunal in *Jamaica Water Supply,* Justice Herlihy commented:

> "In our opinion, the general mandate of the Public Service Law to assure safe and adequate service at just and reasonable rates (Public Service Law, §89-b, subd. 1; §89-c, subd. 4; §89.J) necessarily implies the power to control the disbursements of funds as dividends. The fact that dividends are solely a matter of corporate affairs does not insulate them from having an impact on rates and service. The solvency of a public utility is clearly related to its status as an organization capable of providing the public service for which it was franchised." (386 N.Y.S. 2d at 232).

Utility solvency and its ability to provide service, the critical issues in *Jamaica Water Supply,* are addressed in this proceeding. The recent experience of this Board,

in the emergent treatment of Jersey Central's application for approval of the "yellowcake" financing (Docket No. 795-487), is illustrative of not only the company's extreme cash-flow difficulties, but the potential for service disruption. A substantial portion of the proceeds of that $30 million secured loan was used to pay the April bill for service rendered by the PJM pool to Jersey Central. If Board approval of the agreement had not been forthcoming and if the PJM pool had insisted upon payment, the petitioner would have faced potentially grave financial consequences (i.e., event of default). Therefore, the importance of maintaining adequate cash resources rather than expending the money to pay dividends, cannot be understated.

The Board adopts staff's position on the issue of dividends and directs at this time that JCP&L not pay to GPU any dividend for the remainder of 1979. By the Order the Board is not precluding GPU from issuing dividends to its common stockholders. We are merely stating that the present evidence as to the financial condition of Jersey Central Power and Light Company is in our view such that for it to issue dividends to its parent GPU, might so exacerbate its cash position as to jeopardize its ability to keep its property in a condition to provide safe, adequate and proper service, N.J.S.A. 48:2-29.2.

*Other Issues*

The Board has had discussions with the Governor's Office and expressed its concern over the applications of the gross receipts and franchise taxes applicable to the replacement energy during this emergency. We feel that to collect these taxes at this time, due to the extraordinary

nature of this incident places an unfair burden on the ratepayer. We have recommended that the State forego the collection of gross receipts and franchise tax revenues which can be attributable to the cost of the replacement energy.

To further aid the petitioner in its efforts to provide the lowest cost energy to ratepayers during this period, the Board has discussed the problem with our gas utilities. These discussions may lead to certain economy sales to JCP&L, with the economic benefits to flow to ratepayers.

The Board has also had discussions with the Federal Energy Regulatory Commission and the PJM interchange on the possibility of supplying JCP&L with replacement energy at cost, rather than through the current split savings pricing mechanism. We direct JCP&L to continue these discussions and would hope that Atlantic City Electric and PSE&G join in their effort.

Further, the Board has discussed with the New Jersey Congressional delegation and Federal officials the possibility of the Federal Government lending assistance during this time of dire financial crisis.

Based upon the foregoing, the Board *HEREBY FINDS* that:

1. JCP&L Company is a public utility of the State of New Jersey subject to the jurisdiction of the Board.

2. TMI-I nuclear generating station is experiencing a temporary outage and is expected to return to commercial service on or about January 1, 1980.

*Appendix B*

3. TMI-2 nuclear generating station is out of commercial service is not used or useful due to substantial physical damage, and will not return to service, for two to four years, if ever.

4. On the basis of two and three above, TMI-1 should continue to be reflected in base rates until January 1, 1980; and TMI-2 should be removed from base rates until that unit is returned to commercial service.

5. The revised LEAC proposed by the Company designed to recover $113 million of additional revenues for replacement energy costs relating to the TMI nuclear accident be denied.

6. The petitioner's estimate of replacement energy cost over the 21 month period (April 1979 to December 1980) of $138 million is reasonable.

7. The petitioner's estimated savings of approximately $16 million associated with anticipated purchase power agreements are reasonable.

8. The staff's additional estimated savings of $17 million associated with petitioner's purchase power agreements now being negotiated, as well as to reflect the staff's incentive of passing capacity charges through, the LEAC, are reasonable.

9. The staff's proposed $7.3 million adjustment in recognition of the allowance of replacement energy cost for April, May and June, is reasonable.

10. Based on the above findings in 6, 7 and 8, the Board finds that JCP&L should be given an opportunity to recover approximately $98 million in replacement energy costs through the 18 month LEAC factor.

11. Petitioner's apparent financial position is such that the payment of dividends to GPU might impair JCP&L's ability to provide safe, adequate and proper service.

Therefore the Board *HEREBY ORDERS THAT*:

1. Petitioner file for the Board's consideration revised tariff to produce an annual reduction of $29 million in base rates.

2. Petitioner file a revised LEAC tariff to reflect a new LEAC factor of 6.275 mills/kwh.

3. The treatment of capacity charges associated with purchased power agreements related to replacement energy costs associated with the TMI incident be recognized directly through the LEAC factor.

4. Petitioner file monthly statements reflecting the status of TMI-1 and TMI-2 together with any reports filed with or from the Nuclear Regulatory Commission or any other governmental agency or institution involved in the investigation of this incident.

5. Petitioner file monthly reports covering the cost of rehabilitating TMI-2 as well as the scheduling of these rehabilitation activities.

6. Petitioner file monthly reports on the results of the LEAC factor herein authorized, indicating the actual vs. budgeted energy replacement cost and the revenues derived therefrom.

7. Petitioner file with the Board reports of the status of all purchased power agreements.

8. Petitioner file monthly reports indicating the level of short-term borrowing outstanding under the RCA, and the company's legal limit of short-term borrowings.

9. Based on present cash projections, petitioner is not to pay any dividend to its parent, GPU, during the remainder of 1979.

10. JCP&L eliminate the appropriate gross receipts and franchise taxes from all sales made to other New Jersey public utilities.

11. The parties to this proceeding shall within the next several weeks identify the remaining issues in controversy and develop a schedule of hearings to deal with those issues. In particular, the parties should address the need for a management audit of JCP&L, and determine a conservation strategy consistent with this crisis situation.

DATED: June 18, 1979

(SEAL)

BOARD OF PUBLIC UTILITIES
BY: (SIGNED)

George H. Barbour
President

Richard B. McGlynn
Commissioner

Edward H. Hynes
Commissioner

ATTEST:

(SIGNED)

Gerald A. Calabrese
Secretary

*Appendix B*

JERSEY CENTRAL POWER AND LIGHT COMPANY

Docket No. 795-427

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*Appendix B*

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